

ORIGINAL

FEDERAL MARITIME COMMISSION

GREEN MASTER INT'L
FREIGHT SERVICES LTD -
POSSIBLE VIOLATIONS OF
SECTIONS 1 O(A) (1) AND
1 O(B) (1) OF THE SHIPPING
ACT OF 1984

Docket No. 01-10

Served: February 28, 2003

Respondent found to have violated sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(a)(1) and 1709(b)(1), and the Commission assessed a civil penalty of \$1,530,000 for these violations.

In reaching a decision on exceptions, the Commission can only rely on the evidence of record.

Report and Order affirming Initial Decision.

BY THE COMMISSION: Steven R. BLUST, *Chairman*,
Joseph BRENNAN, Harold J. CREEL, Jr., Rebecca F.
DYE, and Delmond J.H. WON, Commissioners.

COUNSEL: Vern W. Hill and *Heather M. Burns*, for the BUREAU OF ENFORCEMENT. David P. Street, GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, for Respondent, Green Master Int'l Freight Services, Ltd.

ORDER

This proceeding was initiated by the Federal Maritime Commission ("Commission") to determine whether Green Master Int'l Freight Services, Ltd. ("Green Master" or "Respondent") violated sections 10(a)(1)¹ and 10(b)(1)² of the Shipping Act of 1984

Section 10(a)(1) states that no person may:

knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

²Section 10(b)(1), which was replaced with section 10(b)(2)(A) of the Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. 105-258, 112 Stat. 1902, provided that no common carrier either alone or in conjunction with any other person, directly or indirectly, may -

charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith

(continued..)

("Shipping Act"), 46 U.S.C. app. §§ 1709(a)(1) and (b)(1) (1998). In the event Green Master was found to have committed the specified violations, the Commission also sought to determine whether civil penalties should be assessed against it and in what amount, and whether Green Master's tariff should be suspended. The Commission's Bureau of Enforcement ("BOE") was made a party to this proceeding.

Green Master is a non-vessel-operating common carrier ("NVOCC") registered as a private limited company in Taiwan, with offices in the cities of Taipei and Kaohsiung, Taiwan. Green Master filed its tariff with the Commission on January 17, 1997, and secured a surety bond pursuant to the requirements of the Shipping Act and the Commission's regulations.

BACKGROUND

This proceeding was initially assigned to Administrative

(...continued)

than the rates and charges that are shown in its tariffs or service contracts.

Section 10(b)(2)(A) states that:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may - provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 15(a)(1) or 16 of this Act.

Law Judge Paul B. Lang, but was subsequently reassigned to Administrative Law Judge Michael A. Rosas ("ALJ"), to whom the parties submitted briefs and who issued the Initial Decision ("I.D.").

BOE contended that Green Master violated section 10(a)(1) on 48 occasions by knowingly and willfully obtaining ocean transportation for property at less than the applicable rates, by illegally accessing service contracts to which it was neither a signatory nor an affiliate of a signatory.³ BOE also averred that Green Master violated section 10(b)(1) on 20 occasions by knowingly and willfully deviating from its tariff, and by failing to assess a documentation fee in accordance with its tariff rules. Further, BOE asked that the Commission assess maximum penalties against Green Master in the amount of \$2,200,000 and direct Green Master to cease and desist from violating the enumerated sections of the Shipping Act. BOE further asserted that there was no reason to suspend Green Master's tariff, particularly if an appropriate cease and desist order issued.

Green Master denied that it had accessed service contracts to which it was not a signatory or an affiliate and stated that it had merely accessed Hudson's service contracts as a duly authorized agent of Hudson in order to book cargo on Hudson's behalf. Although Green Master conceded that it had failed to file specific shipping rates when it filed its tariff on January 17, 1997, it attributed this failure to inexperience as a newly formed company

³Green Master was charged with accessing two service contracts entered into by Hudson Shipping (Hong Kong), Ltd. ("Hudson"), one with Hyundai Merchant Marine Co., Ltd. ("Hyundai"), the other with DSR/Senator Lines GmbH ("Senator"). Hudson's conduct is currently the subject of an order of investigation in Docket No. 02-06.

and maintained that it discovered and corrected this error long before the initiation of this investigation by the Commission.

The ALJ found that Green Master violated sections 10(a)(1) and 10(b)(1) of the Shipping Act and issued sanctions against it in the form of a civil penalty and a cease and desist order. Green Master filed exceptions to this decision and BOE submitted replies thereto.

INITIAL DECISION

The ALJ found that there was sufficient evidence showing that Green Master violated the Shipping Act on 68 occasions. I.D. at 1.

A. Section 10(a)(1) Violations

With regard to section 10(a)(1), the ALJ found that the evidence demonstrated that Green Master knowingly and willfully obtained ocean transportation at less than the applicable rates by accessing service contracts to which it was neither a signatory nor an affiliate of a signatory 48 times from 1998-1999. Id. The ALJ stated that BOE had rebutted Green Master's claim that it had acted as an agent for Hudson with regard to the shipments pursuant to an oral agreement with Hudson. Id. at 15. The ALJ also stated that BOE had correctly pointed out that such statements were not supported by any credible evidence and that BOE had argued convincingly that it was likely that the shippers believed that they were dealing only with Green Master because Green Master issued its bills of lading for the shipments, while the carriers thought that they were dealing with Hudson because Green Master had identified itself to them as Hudson's agent. Id. In addition, the ALJ held that by issuing its bills of lading as freight receipts, Green Master was imputing different roles to itself in an attempt to avoid

compliance with U.S. and Taiwanese laws. Id. at 15-16.

Moreover, the ALJ found that Green Master had used unfair or unjust means to obtain transportation at less than the filed tariff rates by improperly accessing Hudson's service contracts with Senator and Hyundai. The ALJ stated that Green Master, not Hudson, was the actual carrier for the 48 shipments, finding that Green Master's destination agents had no dealings with Hudson and that a bill of lading, the document used for the shipments, usually serves as more than "a mere freight receipt." Id. at 17. The ALJ further noted that the bills of lading issued by Green Master for these particular shipments did not indicate that Green Master was acting as agent for Hudson and stated that they differ from five other bills of lading provided by Green Master in which it is listed as an agent for Hudson. The ALJ, therefore, found that the relationship between Green Master and Hudson was not one-dimensional and that there were instances in which Green Master served as Hudson's agent and others, "like here, where Green Master acted surreptitiously as the carrier." Id. at 17-18. The ALJ further maintained that apart from the fact that the bills of lading indicate that Green Master acted as the carrier for the 48 shipments, other facts do not support a finding that Green Master was acting as Hudson's agent for these shipments. Id. at 18. Noting that Green Master was required to pay Hudson \$20 for each container that it shipped by accessing Hudson's service contracts with Senator and Hyundai, the ALJ concluded that Green Master was acting primarily for its own benefit and was not subject to the continuous direction of Hudson. He further noted that "in an agency relationship, it is the principal that pays the agent, not the other way around." Id. at 18-19.

B. Section 10(b)(1) Violations

The ALJ further found that Green Master violated section

10(b)(1) on 20 occasions from 1997 to 1998 by knowingly and willfully charging, demanding, collecting or receiving less or different compensation than its published tariff rates. Id. at 1. The ALJ stated that section 10(b)(1) is an absolute-liability statute and that, while the intention of the carrier is irrelevant to a determination of liability under the statute, it can be considered as a mitigating factor when assessing penalties. Id. at 20.

With regard to Green Master's attribution of its failure to file specific shipping rates to a mistake and its assertion that it had corrected the mistake before the Commission began its investigation, the ALJ noted that the filing of a Cargo N.O.S.⁴ rate does not, in and of itself, violate the Shipping Act. However, he further noted that Green Master conceded that it failed to charge the applicable tariff rates on 18 occasions from November 3, 1997 to January 5, 1998. Id. at 21. Moreover, the ALJ found that Green Master "charged less than the amount set forth in its filed tariff and that is enough for a section 10(b)(1) violation and a determination of undercharges flowing therefrom." Id.

Green Master had asserted with regard to two of the shipments that Hudson was listed as the shipper for these shipments and that, therefore, it could not have committed a violation of section 10(b)(1) because to prove such a violation it must be shown that the violator acted as a carrier. Green Master's Reply to BOE's Opening Brief at 10. The ALJ agreed that section 10(b)(1) only applies to carriers but nonetheless found that the applicable bills of lading for the two shipments demonstrated that Green Master was the actual carrier for the shipments. The ALJ concluded that Green Master undercharged shippers in the aggregate by \$802,443.84, for the 20 violations of section 10(b)(1). Id. at 21.

⁴Cargo Not Otherwise Specified.

In its Opening Brief, BOE alleged, based on its review of trade data in the Journal of Commerce PIERS database, that Green Master acted as the “overseas exporter” for 256 shipments from November 1997 to January 1998, and that Green Master likely failed to charge its tariff rates for those 256 shipments. BOE’s Brief at 20-21. The ALJ disagreed, however, finding that although individual shipping information in a widely used industry publication is relevant, material and reliable, it is not sufficiently probative and should be excluded for purposes of establishing additional violations. I.D. at 21-22.

C. Assessment of Civil Penalty

In determining the proper civil penalty for the 68 violations Green Master was found to have committed, the ALJ stated that section 13(c) of the Shipping Act required him to consider the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. Id. at 22. In this regard, the ALJ found that the extent and gravity of the violations committed by Green Master were substantial, particularly in two respects. He stated that the 48 shipments that Green Master had made under the Hudson-Hyundai and Hudson-Senator service contracts over a one-year period found to be in violation of section 10(a)(1) deprived the carriers of \$266,763.53 in freight charges, and, further, that \$55,715.50, the amount Green Master had charged for the twenty shipments found to be in violation of section 10(b)(1), was less than one-fourteenth of the -applicable freight charges of \$802,443.84 it should have assessed for the shipments. Id. at 23.

With respect to Green Master’s history of prior offenses, the ALJ stated that its general manager, Jeff Sun, “was personally familiar with the Commission’s attitude towards violations of section 10(b)(1),” and that rather than implement lessons learned

after his former company, Trans Oceans-Pacific Forwarding, Inc. (“TOP”), was assessed civil penalties in the amount of \$1,450,000,⁵ he joined Green Master and managed the company by filing essentially meaningless N.O.S rates. Id. at 25. The ALJ noted that rather than denying BOE’s allegation that the Jeff Sun who worked for TOP is the same Jeff Sun currently working for it, Green Master had merely asserted that BOE had not sufficiently proven this allegation, and further found that “under the circumstances it is reasonable to infer that Jeff Sun was the same person involved in the control of TOP.” Id. The ALJ then held that “Sun’s history of Shipping Act violations, coupled with his embracement by Green Master, constitutes an aggravating factor in determining an appropriate penalty.” Id. at 24.

With regard to Green Master’s ability to pay a civil penalty, the ALJ stated that BOE had produced an expert witness who testified that Green Master’s financial condition was strong, that it employed approximately 50 people, had a net operating income in the \$6,000,000-\$7,000,000 range and \$239,902 in fully paid capital’ and a \$50,000 bond on file with the Commission during the period the violations occurred. Moreover, he noted that Green Master had purchased three other companies involved in the transportation industry which shared Green Master’s office space as well as its employees. Id. at 26. The ALJ noted that Green Master had contended that its financial position was not strong, claiming that

⁵See Docket No. 94-11, Trans Ocean-Pacific Forwarding, Inc. - Possible Violations of Section IO(b)(I) of the Shipping Act of 1984, 27 S.R.R. 409,412 (I.D.), administratively final February 9, 1996.

⁶The ALJ describes “fully paid capital” as the amount Green Master’s shareholders have paid in excess of the par value of the common stock issued by the company.

its cash position had “drastically declined” between 1998 and 2000 from \$550,000 to approximately \$106,000, its total net worth was only \$281,089 at the end of 2000, its gross profits reflected a revenue of approximately \$1,000,000 per year and its total net worth only increased by \$29,000, from 1999 to 2000. Id. Nevertheless, the ALJ found that Green Master did not explain its connection with the three other companies it owns and shares office space with, as well as the extent, if any, to which assets and liabilities are commingled among the four companies. Id. The ALJ asserted that an administrative law judge is not confined to assessing a penalty solely upon Green Master’s operating revenues, but must also consider all of the section 13(c) factors, as well as the fact that “civil penalties are punitive in nature and the main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act.” Id.

Finding that Green Master had fully participated in this proceeding and that there existed aggravating factors and no mitigating factors with regard to the application of sanctions and penalties, the ALJ assessed Green Master a civil penalty of \$1,530,000, representing a fine of \$22,500 for each of the 68 violations of the Shipping Act. The ALJ also issued a cease and desist order barring Green Master from committing the stated violations in the future. Id. at 28.

EXCEPTIONS AND REPLY THERETO

A. Green Master’s Exceptions

Green Master filed exceptions objecting to 23 alleged errors

in the I.D., 18 of which pertain to findings of fact made by the ALJ.⁷

‘Green Master made certain statements in its exceptions which BOE asks the Commission to strike as facts asserted for the first time in this proceeding, and not supported by the evidence of record. Green Master, however, asks the Commission to deny BOE’s Motion in its entirety, contending that both the Commission and the federal courts have long recognized the competence of administrative agencies to independently assess the weight of evidence and argument in formal proceedings unfettered by the common law exclusionary rules. Green Master’s Reply to the Motion to Strike at 1. Green Master further maintains that the Commission’s rules also emphasize justness and sound administrative procedure, not technical exclusionary rules. Id. at 2-3.

Rule 154 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.154, states, in pertinent part, that “every party shall have the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

As discussed infra, the Commission’s rules and precedent mandate that a decision be reached relying only upon reliable, probative, and substantial evidence of record. A review of the record of this proceeding indicates that Green Master raised new facts that are inappropriate at this stage in the proceeding and thus should be excluded. None of the authorities Respondent cites stands for the proposition that the Commission may look outside the evidentiary record in reaching a decision, or consider statements and facts unsupported by such evidence.

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First, Green Master excepts to Findings of Fact Nos. 6, 9, 12, 14, 15, 22, 26, 31, 40, 43-45 and 50-55. Green Master's Exceptions at 2-8. Green Master contends that some of the Findings of Fact are actually legal conclusions in disguise, are not supported by the evidence of record, mischaracterize the information provided in the affidavits it submitted, do not define the meaning of some of the terms used by the ALJ, and/or are incorrect. Id.

Second, Green Master objects to what it describes as the ALJ's failure to give any credence to the affidavits of its general manager, Jeff Sun, and its chief executive officer, Sunny Ng, while relying heavily on the affidavits submitted by BOE. Id. at 1. Green Master contends that, because both sets of affidavits were ex parte and the ALJ did not have the opportunity to see any of the witnesses or have them cross-examined before him, all the affidavits should have been given equal weight. Id. at 10.

Third, Green Master excepts to the ALJ's finding that it

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Further, while Green Master is correct to assert that Commission rules emphasize justness and sound administrative procedure, allowing Green Master to present as fact information which BOE has not been given the opportunity to rebut does not appear to promote these principles and, further, would contravene Commission rules.

For these reasons we will grant BOE's Motion to Strike the specified portions of Green Master's Memorandum of Exceptions and Brief in Support of Memorandum which are raised in this stage of the proceeding for the first time.

violated sections 10(a)(1) and 10(b)(1). Id. at 8. Green Master avers that it acted as Hudson's agent for the shipments giving rise to the alleged violations as corroborated by testimony from Hudson, Green Master's affidavits, and even evidence introduced by BOE. Id. at 10, 13. Green Master contends that it clearly identified itself as the forwarding agent on each of the Hyundai bills of lading in this proceeding, and as Hudson's agent to Senator, and did not intend to deceive the carriers or cheat them out of their compensation. Id. at 11. Green Master further argues that the carriers were aware that it was Hudson's agent and that Senator paid close attention to the identity and authority of the loading agents under its contracts with Hudson and rejected bookings from an agent in the Philippines whom it found not to be an unauthorized agent. Id. at 13.

In addition, Green Master contends that BOE's evidence provides further proof that it was Hudson's agent, citing paragraph 11 of BOE Exhibit 1, an affidavit by Emanuel J. Mingione, the Commission's New York area representative, indicating that he had interviewed the CEO of one of Green Master's destination agents who had stated that "he believed that Green Master was Hudson's agent." Id. Citing Attachment K to BOE Exhibit 1, a letter from Hudson, Green Master claims that the letter is a "detailed communication to Hudson's agents of service contracts and service contract proposals" which "provides evidence of Hudson's management of its agency network through general meetings of agents and the requirement that all agents submit monthly loading reports to Hudson to enable it to monitor each office." Id.

Green Master further maintains that BOE failed to meet its burden to show that it was not acting as Hudson's agent when it tendered the shipments to the carriers and that therefore there was no basis for the ALJ to conclude that it violated section 10(a)(1). Id. at 14-15. Green Master argues that the ALJ's finding that it was not

Hudson's agent because its agents had no involvement or familiarity with Hudson is "directly contradicted" by the CEO's statement that he believed that Green Master was Hudson's agent. Id. at 15. Green Master states, moreover, that whether the agents dealt directly with Hudson or through Green Master has no bearing on Green Master's relationship with Hudson. Id.

Green Master denies that it intended to deceive the carriers by issuing its bills of lading to shippers. It states that although the documents were labeled "bill of lading" they were only intended to serve as freight receipts not contracts of carriage, pointing to the fact that the reverse side of the bills of lading did not contain any terms and conditions constituting contracts of carriage. Id. at 16. Green Master further maintains that these documents were not negotiable, arguing that because non-negotiable documents cannot be used to transfer title to goods, the "bills of lading" issued by Green Master for the subject shipments were "no more than receipts for cargo." Id.

Green Master next addresses the ALJ's finding that it did not act as Hudson's agent based on the fact that Hudson, in a letter,⁸ demanded from Green Master a payment of \$20 for each container Green Master shipped under Hudson's service contract. Green Master states that both the factual assertion and the legal conclusion in the ALJ's assertion that in an agency relationship the

⁸The portion of the letter issued by Hudson referring to the \$20 fee states as follows:

Furthermore, to make ourself more functioning and as per our general meeting in Macau, all origin ports by using our above s/c are required to pay Hudson Shipping a[n] administration fee of US \$20/container.

principal pays the agent and not the other way round are “fallacious.” Id. at 16-17. Green Master adds that the letter merely indicates “that the members of Hudson’s agency network had reached a prior agreement at the general meeting in Macau to assess fees on each agent to support the network and make it ‘more functioning.’” Id. at 17.

Green Master also contends that the ALJ’s finding that it violated section IO(b)(I) was erroneous, stating that its failure to file commodity rates was due to a mistake which it immediately corrected when it discovered the problem. Id. In addition, Green Master maintains that there is insufficient evidence in the record to determine what charges it assessed its consignees for the shipments for which it is alleged not to have charged its tariff rates and that absent such a showing there can be no finding that it violated section IO(b)(I). Id. at 19-20. With regard to two of the 20 shipments, Green Master further maintains that Hudson was listed as the shipper, that it acted as agent for Hudson and not for its own account, and that therefore it had no tariff filing obligations with respect to those two shipments. Id. at 21.

Further, Green Master argues that BOE has presented no evidence that it failed to charge the document handling fee set forth in its tariff and that the ALJ’s finding that the aggregate undercharges resulting from its improper rating of cargo was \$802,443.84 was erroneous. Green Master states that even if, for the purpose of argument, the ALJ was correct in his calculation of the aggregate differential between the rates charged by Green Master and its Cargo N.O.S. rate, this comparison is “meaningless and prejudicial” because “as the Commission has long recognized, Cargo N.O.S. rates are not rates actually charged to shippers.” Id. at 22.

Green Master also contends that the ALJ erred in finding

that it violated sections 10(a)(1) and 10(b)(1) knowingly and willfully. It argues that both the Shipping Act and Supreme Court precedent require that separate findings be made with respect to whether the violations were committed “knowingly” and “willfully.” Id. at 23. Green Master further argues that even if the ALJ was correct to find that it was not acting as Hudson’s agent for the 48 shipments, there is no support for the ALJ’s finding that it acted “knowingly” or “willfully” within the meaning of section 10(a)(1) because it believed that it was acting as Hudson’s agent and had a “good faith belief” that it was proper to act as Hudson’s authorized agent. Id. at 25-26. Green Master adds, moreover, that even if there were sufficient evidence to demonstrate that it failed to charge the rates in its tariff, the evidence in this proceeding does not support a finding that it acted “willfully” to evade the tariff filing requirements of section 10(b)(1). Id. Therefore, Green Master argues, even if the Commission were to find that it violated section 10(b)(1), such a finding would only support civil penalties in the amount of \$5,000 per violation, and not the \$22,500 per violation assessed by the ALJ. Id. at 27.

Fourth, Green Master excepts to the ALJ’s consideration of the statutorily-required factors in his determination of the proper amount of the penalty. Id. Green Master contends that the ALJ’s reliance on BOE’s allegations is misplaced, arguing that BOE has not provided substantial, credible evidence that the Jeff Sun who works for Green Master is the same Jeff Sun who worked for TOP, and that BOE’s contention is based on an allegation from an unnamed source. Id. at 27. Green Master further contends that BOE had ample opportunity during discovery to explore and substantiate this allegation and failed to do so, and that there is no evidence that the Jeff Sun who worked for TOP was personally involved in the Shipping Act violations. Citing Trans Ocean Pacific, supra, Green Master maintains that according to BOE’s evidence, the TOP employee responsible for the violations was

someone by the name of Eddie Ng and that there is no finding or evidence in that decision indicating that the Jeff Sun who worked for TOP was aware of Mr. Ng's activities or condoned them. Id. at 27-28. Green Master notes that "as a legal matter, of course, no 'Jeff Sun' has ever been found liable for Shipping Act violations." Id. at 29.

Further, Green Master disputes the ALJ's finding that it is able to pay the civil penalty assessed, arguing that the ALJ improperly relied on the testimony of BOE's witness, James F. Carey, who, Green Master states, was never qualified as an expert. Also, Green Master contends that Mr. Carey's statement in his affidavit, that Green Master maintained a net operating income in the \$6,000,000 - \$7,000,000 U.S. dollar range during the years 1998-2000, is misleading. Id. In addition, Green Master opines that the amount of civil penalty assessed by the ALJ is not in keeping with Commission precedent in which the Commission has stated that its intention in assessing civil penalties is not to put companies out of business. Id. at 31.

In sum, Green Master requests that the Commission reject any facts concerning the Trans Ocean-Pacific case or allegations of Jeff Sun's personal liability for previous Shipping Act violations, find that Green Master has no prior history of violations, that it is not culpable for willful violations of the Shipping Act and that it does not have the financial ability to pay huge civil penalties. Id.

B. BOE's Reply to Green Master's Exceptions

BOE maintains that the I.D. is correct and that the ALJ's conclusions were appropriate. BOE's Reply at 2. BOE states that Green Master's allegation that the ALJ improperly failed to assign equal weight to the evidence submitted by the parties has no merit. Id. BOE contends that the I.D. contains several instances where

the ALJ discusses the testimony presented by Green Master and then indicates that the testimony is either not reliable, not supported by evidence or is rebutted by BOE's evidence. Further, BOE states that the ALJ considered Green Master's arguments and its interpretation of the evidence presented by BOE and ultimately decided that BOE's evidence was more reliable and indicative of the violations that occurred, supporting his conclusions with appropriate legal precedent. Id. at 3.

In addition, BOE maintains that the ALJ correctly held that Green Master knowingly and willfully violated sections 10(a)(1) and 10(b)(1). Id. at 4. BOE argues that there is no evidence backing up Green Master's claim to have made an oral agency agreement with Hudson and that the ALJ was correct to find that Green Master was the carrier for the subject shipments. Id. at 5. BOE asserts that, by identifying itself as agent on the carriers' bills of lading and by naming Hudson as the shipper, Green Master improperly obtained access to the service contract rates. Id. at 6.

BOE also asserts that neither Green Master's affiants nor any documents presented by Green Master corroborate Green Master's claim that Hudson identified it as a loading agent under the Hyundai or Senator service contracts. Moreover, BOE suggests that the carriers may not have enforced the loading agent requirement, adding that there is evidence in another proceeding that at least one other Taiwan-based NVOCC also used the Hyundai and Senator service contracts for its own shipments by identifying itself as Hudson's forwarding agent.' Id. 6-7. BOE also contends that Green Master did not act as a loading agent, stating that the evidentiary record shows that Green Master acted as carrier

⁹BOE cites Docket No. 01-09, Transglobal Forwarding Co., Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 29 S.R.R. 814 (I.D.), administratively final June 17, 2002.

for the 48 shipments, thus leading the ALJ to conclude that Respondent violated section 10(a)(1) of the Shipping Act. Id.

As for Green Master's argument that its bill of lading was merely a freight receipt that it was obligated to issue because of a Taiwanese law requiring that an NVOCC use a bill of lading that has been registered and insured pursuant to government regulations, BOE states that the existence of such a law is unsubstantiated, and that there are numerous problems associated with Green Master's argument. Id. at 7. BOE questions the use of a "document labeled 'bill of lading' signed by Respondent 'as carrier' when the alleged sole purpose of the document is a receipt." Id. BOE also notes that if the shipper and consignee had only a freight receipt for their goods, then Green Master is claiming that the shipment was made without using a bill of lading. Id. BOE questions how the subject shipments could have taken place without the use of such a bill of lading, if Taiwanese law requires the use of a bill of lading that has been registered and insured. Id. at 8. BOE further notes that the alleged Taiwanese law, if it exists, would necessitate that in order to conduct business from that country lawfully, Hudson could not operate from Taiwan until it registered and insured its bill of lading. Id. at 8.

BOE argues that Green Master's claim that its bills of lading were not actual bills of lading because they lack contract of carriage provisions on the reverse side is without merit, noting that the documents obtained from Green Master's destination agent were non-negotiable bills of lading and therefore did not require any terms to be printed on the reverse side. BOE further argues that there is no evidence as to whether the original, negotiable bills of lading would have had additional terms of carriage printed on the reverse side and that, moreover, destination agents do not normally receive negotiable bills of lading because they are not the party with a commercial interest in the cargo. Id. at 8.

BOE maintains that the ALJ properly concluded that the language in Hudson's letter "using our service contract" was additional evidence indicating that Green Master utilized Hudson's service contracts for its own shipments." Id. at 9. BOE asserts, moreover, that even without the existence of this letter, the shipping documentation still establishes that Green Master issued its own bills of lading for the subject shipments, while reporting them to the carriers as belonging to Hudson. Id. at 10.

Further, BOE avers that the ALJ correctly applied the "knowing and willful" standard when assessing civil penalties. Id. at 15-17. BOE argues that, contrary to Green Master's argument, the Commission has not required two separate findings as to whether a violation was committed "knowingly" and "willfully," and that for the purposes of setting a civil penalty amount, the Commission has clearly defined the "knowing and willful" standard "in terms of the actions, or inactions, of the respondent." Id. at 16. BOE submits, in addition, that by accessing Hudson's service contracts through "falsely identifying" the carrier on the shipments as Hudson, and by failing to file and follow rates in its tariff, Green Master intentionally disregarded the requirements of the Shipping Act and thus committed knowing and willful violations of the Shipping Act. Id. at 17.

BOE contends that the ALJ correctly applied the statutory requirements in determining civil penalties. Id. BOE states that the ALJ was correct to rely on its affiant's testimony to infer that

¹⁰As part of this argument, BOE also cites a portion of the letter that states "if you have any rate request during the life of the s/c. Pls send us your request." BOE contends that this language further establishes that the so-called "agents" used Hudson's service contracts for their own shipments and not as true agents for Hudson.

Green Master's Jeff Sun formerly worked with TOP and had previous experience in the shipping industry and knowledge of the Shipping Act. Id.

Citing the Administrative Procedure Act, federal case law, Commission regulations, and Commission precedent," BOE asserts that administrative proceedings have liberal standards governing the admission of evidence so that an agency will not be deprived of any evidence which could shed some light on the issues. BOE further maintains that testimony from a Commission investigator with respect to information from third parties regarding suspected violations of the Shipping Act and the Commission's regulations has in the past been admitted into the record as probative and reliable. Id. at 17-18.

BOE contends that the record in Trans Ocean Pacific, supra, provides uncontroverted evidence that Green Master's Jeff Sun was the president of TOP, and had knowledge of, and control over, the operations of the TOP offices in the United States. Id. at 19. For example, BOE notes that a comparison of the signatures of Jeff Sun, the president of TOP and Green Master's Jeff Sun, indicates that they belong to the same person. Id. BOE further argues that Green Master could have questioned BOE's witness with respect to his testimony that Green Master's Jeff Sun worked for TOP but chose not to, and that, therefore, Green Master cannot now complain that the ALJ has relied upon that testimony in making his decision. Id. at 20.

"5 U.S.C. § 556(d); 46 C.F.R. §502.156; Samuel H. Moss v. Fed. Trade Comm'n, 148 F.2d 378,380 (2d Cir., 1945); and Pacific Champion Express Co., Ltd. - Possible Violations of Section 10(b)(1) of the Shipping: Act of 1984, 28 S.R.R. 1397, 1402-1403 (I.D.), administratively final April 21, 2000.

BOE objects to Green Master's characterization of James F. Carey's statement as misleading, contending that, as an area representative with the Commission, with experience in evaluating financial records and tax returns, Mr. Carey is qualified to testify in proceedings regarding his analysis of financial records and information and has testified before the Commission in other proceedings. BOE points out that the numbers cited by Mr. Carey and his conclusion that Green Master's level of operating income reflects a strong financial position are based upon the evidence submitted in this proceeding. Id. at 21. In addition, BOE states that it entered into a stipulation with Green Master, providing that rather than submit the documents themselves into evidence, the parties could cite to the information in their respective evidentiary cases, and such information would be considered "true and accurate," because Green Master did not want to have its financial records, (namely its balance sheets and income statements for fiscal years 1998-2000) released to the public through submission in this proceeding. Id. at 22.

BOE contends that the ALJ correctly analyzed the documentary and testimonial evidence relating to Respondent's financial condition and determined that Respondent was able to pay the assessed civil penalty. Id. at 23. Therefore, BOE asks the Commission to affirm the ALJ's assessment of the civil penalty. Id.

DISCUSSION

A. The ALJ's Findings of Fact

Green Master raises 18 objections to the ALJ's Findings of Fact, some of them bordering on the frivolous. For instance, Green Master objects to the ALJ's characterization as "freight forwarder block" the block provided in Senator's bill of lading for the insertion of the name of the forwarding agent. Green Master

submits that this is a “material and prejudicial error.” Green Master’s Exceptions Nos. 3 and 5 at 3. This exception has no merit because a forwarding agent is the same as a freight forwarder.* Moreover, Commission rules require disclosure of the forwarder on the bill of lading, identifying the forwarder as the “shipper’s agent.”¹³

Similarly, Green Master objects to the ALJ’s failure to define the term “utilize”¹⁴ in Finding of Fact No. 26, and “net operating income” and “a medium to large ocean transportation intermediary” in Findings of Fact Nos. 50 and 55, respectively. The ALJ used these terms as they are defined by common usage, but did not quantify “medium to large.” However, there was no specific error alleged by Respondent as to that aspect of the finding. We thus find nothing inappropriate in the use of these terms.

Green Master also objects to Finding of Fact No. 40 in which the ALJ found that Green Master transported 256 shipments during November 1997 to January 1998. This finding was based on the affidavit of BOE’s witness, Michael A. Moneck, an area representative, who testified that his review of the Journal of Commerce PIERs database profile for Green Master for the time period of November 1997 to January 1998, showed that Green Master acted as the “overseas exporter” with respect to 256 shipments of cargo. I.D. at 12. However, the ALJ rejected BOE’s contention that Green Master likely failed to charge its tariff rates

¹²See, e.g., *The Marine Encyclopaedic Dictionary* at 180, which states that freight forwarders are also considered forwarding agents.

¹³See 46 C.F.R. § 515.42(a).

¹⁴The ALJ quoted this term directly from the Hudson/Hyundai service contract.

on these 256 shipments, finding that BOE's contention was premised on an article in an industry trade journal "which although ... relevant, material and reliable, is not sufficiently probative." Id. at 21-22. The ALJ also found that evidence submitted by Green Master showing that it may have acted as Hudson's agent with respect to five shipments rendered the term "overseas exporter" vague. Id. at 22. Green Master's exception is misplaced. The ALJ's finding is limited to the fact that the shipments took place; he did not find, as BOE had argued, that Green Master likely failed to collect the applicable rates for these shipments. We therefore uphold the ALJ's finding that Green Master transported 256 shipments during this period.

Green Master further contends that some of the Findings of Fact were legal conclusions in disguise, not supported by the evidence of record, mischaracterized the information provided in the affidavits, and contained terms whose meanings were not defined by the ALJ. Id. at 2-8. Those exceptions are discussed below as they pertain to each of the remaining issues.

B. Alleged Failure to Give Equal Weight to Evidence Submitted By Both Parties

The ALJ stated that "BOE rebutted Green Master's agency argument in several respects" and that "BOE notes that Green Master's evidence consists of self-serving statements by Ng and Sun, and is not supported by statements of shippers or documentation showing that the shippers believed they were dealing with Green Master as agent for Hudson." I.D. at **15**. Green Master excepts to what it perceives as the ALJ's "failure to give any credence to the Verified Statements" of its witnesses, while relying "heavily on the Affidavits submitted by BOE on the same issues." Green Master's Exceptions at 2. Green Master asserts that there is no basis to differentiate between its affidavits and those submitted by BOE,

and that the ALJ's characterization of the affidavits as self-serving is a "meaningless epithet" and an error. Id. at **10**.

BOE, on the other hand, contends that the ALJ exercised appropriate discretion in deciding how much weight to give to evidence submitted by each party, and that there are numerous instances where the ALJ discusses testimony submitted by Green Master and indicates that the testimony is either unreliable, unsupported by evidence, or rebutted by BOE. BOE's Reply at **2**.

As a general rule, "an ALJ may not issue a ruling or impose a sanction without considering the entire record or those parts of it cited by a party and supported by and in accordance with reliable, probative, and substantial evidence." **5** U.S.C. § 556(e). Therefore, we could only find error here if the ALJ did not consider Green Master's affidavits at all, or did not determine whether they rise to the level of reliable, probative and substantial evidence.

As an initial matter, the ALJ did not characterize the affidavits as "self-serving," but instead stated that BOE had rebutted Green Master's agency argument in several respects and that BOE had noted that Green Master's evidence consists of self-serving statements by Ng and Sun, and is not supported by statements of shippers or documentation showing that the shippers believed they were dealing with Green Master as agent for Hudson. I.D. at **15**. Therefore, the ALJ was merely referring to BOE's characterization of Green Master's evidence.

Addressing Green Master's allegation that the ALJ failed to consider the affidavits, a review of the I.D. indicates that the ALJ took the testimony of Mr. Sun and Mr. Ng into consideration but was not persuaded by their affidavits. Green Master did not provide any credible evidence to substantiate its claim that it acted

as Hudson's agent, nor has it shown that the ALJ erred in weighing the evidence. The affidavits submitted by Mr. Sun and Mr. Ng do not, standing alone, prove that Green Master acted as Hudson's agent rather than on its own behalf. Therefore, the ALJ's decision in this issue was proper, and we affirm this portion of the I.D.

C. Finding That Green Master Violated Sections 10(a)(1) and IO(b)(1) of the Shipping Act.

1. Section 10(a)(1) Violations

The ALJ found that the evidence demonstrates that Green Master violated section 10(a)(1) on 48 occasions by using unfair or unjust means to obtain transportation at less than the applicable tariff rates filed by Senator and Hyundai, by improperly accessing Hudson's service contracts with those carriers. I.D. at 17.

Green Master avers that it acted as an agent for Hudson with regard to these shipments, pursuant to an oral agreement with Hudson. Green Master's Exceptions at 9-10. Green Master also maintains that because it identified itself to the carriers as Hudson's "forwarding agent" and because Senator accepted its designation as a "loading agent" for Hudson, it was in fact acting as agent for Hudson and did not intend to deceive or defraud the carriers. Id. at 11-13. Further, Green Master asserts that the evidence of record supports and corroborates its affidavits, and that BOE has not met its burden to demonstrate that Green Master was not Hudson's agent and therefore violated section 10(a)(1). Id. at 13-14.

BOE contends that the ALJ's findings with regard to the section 10(a)(1) violations were correct and should be upheld by the Commission, arguing that Green Master's claims that it made an oral agreement with Hudson and that it was nominated as

Hudson's loading agent are not substantiated by any documentary evidence. BOE's Reply at 4-6.

The evidence indicates that under the terms of Hudson's service contracts with Senator and Hyundai, Hudson was the only entity entitled to access the service contracts.¹⁵ Further, the evidence supports the ALJ's conclusion that Green Master accessed these service contracts by identifying itself as Hudson's agent, and at the same time issued its own bills of lading to shippers, identifying itself as the carrier for the same shipments." Green Master's contention that the documents it issued labeled "bill of lading" were really receipts for cargo lacks credibility. Green Master is an NVOCC and, as such, is subject to the responsibilities incumbent upon a common carrier. This includes recognizing the commercial importance of shipping documents, including bills of lading."

In addition, the letter from Hudson charging a **\$20** "administrative fee" per container for each container shipped using its service contracts lends support to the finding that Green Master

¹⁵See Exhibit **1** and Attachments A-D, which contain the affidavit of Emanuel J. Mingione and the subject Hyundai and Senator service contracts with Hudson.

¹⁶See Exhibit **1** and Attachments E-J25 which contain the Hyundai, Senator and Green Master bills of lading and invoices for the subject shipments.

¹⁷See In re: Rubin, Rubin & Rubin Corp., 6 F.M.B. 235,239 (1961), stating that an NVOCC must educate itself through normal business resources.

acted for its own account.” Therefore, because BOE’s allegation that Green Master used unfair or unjust means on 48 occasions to obtain transportation at less than the applicable tariff rates by improperly accessing Hudson’s service contracts with Hyundai and Senator is supported by the evidence, and Green Master did not rebut this allegation with any credible evidence that it acted as agent for Hudson, we uphold the ALJ’s finding that Green Master violated section 10(a)(1) on 48 occasions.

2. Section 10(b)(1) Violations.

The ALJ also found that Green Master violated section 10(b)(1) on 20 occasions by charging or collecting less or different compensation than the amount published in its tariff, and by failing to charge shippers the documentation fee required under its tariff rules. I.D. at 12-13, 21. The ALJ further found that the aggregate undercharges resulting from Green Master’s improper rating of the 20 shipments was \$802,443.84. Id. at 12.

Green Master concedes that it failed to file specific commodity rates for **18** of the 20 shipments, but attributes the failure to “a mistake.” Green Master’s Exceptions at **19**. Green Master states that the ALJ erred in finding the section 10(b)(1) violations, arguing that there was no evidence showing what rate it actually charged its consignees for the shipments and that absent such evidence, there can be no finding that it violated section 10(b)(1). Id. Green Master asserts that the ALJ was wrong to rely on invoices it issued to its agent to establish the actual rate charged, arguing that there is no evidence to indicate whether the invoices represent the freight charges assessed against the consignees. Id. at 19-20. Further, Green Master avers that it did not act as a carrier for two of the 20 shipments, and, therefore, it was not under any

¹⁸See BOE Exhibit 1, discussed supra, at p.19,n.9.

obligation to file a tariff rate for those two shipments. Id. at 20-21. In addition, Green Master excepts to the ALJ's finding that it failed to charge a documentation fee, maintaining that there is no evidence to substantiate this finding. Id. at 21-22. Finally, Green Master disputes the ALJ's finding with regard to the aggregate undercharges resulting from its assessment of rates lower than otherwise applicable. It contends that the ALJ's calculation of the undercharges by comparing the aggregate difference between the rates Green Master charged and its Cargo N.O.S. rates is a "meaningless and prejudicial" comparison. Id. at 22.

In response, BOE asserts that even if Green Master's failure to file specific shipping rates was due to a mistake, this is irrelevant because section 10(b)(1) is a strict-liability statute. BOE's Reply at 11. Further, BOE argues that there is precedent for utilizing invoices to determine the amount of undercharges, that Green Master issued its own bills of lading for the two shipments which it claims were shipped on behalf of Hudson, and that there is adequate evidence showing that Green Master did not charge a documentation fee for all 20 of the shipments. Id. at 11-13

Green Master does not dispute that it failed to charge its published rate for 18 of the 20 shipments; it simply attributes the failure to a "mistake." The Commission has found that a violation of section 10(b)(1) occurs when a carrier charges, collects, demands, or receives any rate other than that filed in its tariff, and any attempt to justify that carrier's failure to charge its tariff rates is irrelevant to the issue of whether it violated section 10(b)(1).¹⁹ Consequently, the ALJ's finding that Green Master violated section 10(b)(1) is supported by the evidence and Commission precedent, and we affirm it.

¹⁹See, e.g., Trans Ocean-Pacific Forwarding, Inc., 27 S.R.R. at 412.

Further, Green Master's contention that there is no proof of the charges it assessed consignees is contradicted by the fact that its bills of lading and invoices contain the rates it appears to have charged which are less than or different from the rates Green Master filed in its tariff. Moreover, the documents indicate that Green Master served as a common carrier for the two shipments it claims to have shipped on behalf of Hudson. In addition, ALJs routinely calculate the undercharges by determining the difference between the actual rates assessed and the rates published in the applicable tariff.*'

Equally without merit is Green Master's contention that there is no evidence to show that it did not charge a documentation fee for the 20 shipments. The invoices it issued for these shipments do not show such a charge. This evidence indicates that this charge was not assessed, and Green Master has not refuted that evidence with convincing evidence of its own. Therefore, we affirm the ALJ's finding that Green Master violated sections 10(a)(1) and 10(b)(1), and his determination of the amount of the undercharges.

D. Assessment of Civil Penalties.

1. Finding That Green Master Acted Knowingly and Willfully

Having found that Green Master violated the Shipping Act 68 times, the ALJ next considered, for the purpose of assessing

²⁰See, e.g., Pacific Champion Express Co., Ltd. - Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 1397 (I.D.), administratively final April 21, 2000; and Kin Bridge Express Inc. - Possible Violations of the Shipping Act of 1984, 28 S.R.R. 984, 990 (I.D.), administratively final August 2, 1999.

penalties, whether Green Master's conduct was knowing and willful within the meaning of section 13(a) of the Shipping Act. That section provides for the assessment of a higher civil penalty for violations judged to be knowingly and willfully committed.²¹

a. Section 10(a)(1) Violations

The ALJ found that Green Master committed 48 section 10(a)(1) violations. Green Master objects to the ALJ's finding on the ground that even if the ALJ were correct in finding that it was not acting as Hudson's agent on the 48 occasions, there is no support for a finding that it acted "knowingly" or "willfully" within the meaning of section 10(a)(1) because it did not "know" the facts constituting the violation and had a "good faith belief" that it was properly acting as Hudson's authorized agent. Green Master's Exceptions at 25-26. Green Master further asserts that this

²¹Section 13(a) states, in pertinent part:

Whoever violates a provision of this Act . . . is liable to the United States for a civil penalty. The amount of the civil penalty...may not exceed \$5,000 unless the violation was willfully and knowingly committed, in which case the amount of the penalty may not exceed \$25,000 for each violation.

46 U.S.C. app. § 1712(a).

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, April 26, 1996, these penalties were increased to \$5,500 and \$27,500, respectively. See 46 U.S.C. app. § 1712 and 46 C.F.R. § 506.4(d).

belief was reasonable and cannot be held to constitute a “willful” violation of section 10(a)(1). Id. at 26.

BOE dismisses Green Master’s objection, stating that the Commission has not required separate determinations for the actual violation and the penalty phase of the proceeding. BOE’s Reply at 15. Further, BOE contends that because Green Master failed to file and follow the rates in its tariff it exhibited an intentional disregard for the requirements of the Shipping Act and, thus, knowingly and willfully violated section 10(b) (1). Id.

To act knowingly and willfully is an element of a section 10(a)(1) violation. Therefore, because these violations are per se knowing and willful, once an administrative law judge determines that the respondent committed the violation it is not necessary to make a separate determination as to whether the conduct was knowing and willful for the purpose of assessing penalties. Because the evidence supports the ALJ’s determination that Green Master committed the violations, we affirm the imposition of the increased penalty for these violations.**

b. Section 10(b)(1) Violations

The ALJ found that Green Master violated section 10(b)(1)

²²Trans Ocean-Pacific, 27 S.R.R. at 412. See also, Shipman Int’l (Taiwan) Ltd. - Possible Violations of Sections 8, 10(a)(1), and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 100, 108 (I.D.), administratively final May 30, 1998. “[I]t is noted that ‘willfully and knowingly’ has been defined as meaning purposely or obstinately and is designed to describe the attitude of a carrier, who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements”) (citing U.S. v. Illinois Central R. Co., 303 U.S. 239 (1938)).

knowingly and willfully, stating that although the intentions of the carrier are irrelevant to a determination of liability under the statute, they can be considered when assessing penalties. I.D. at **1, 20.**

Green Master contends that even if there is sufficient evidence to demonstrate that it failed to charge the rates in its tariff, the evidence in this proceeding does not support a finding that it acted willfully to evade the tariff filing requirements of section 10(b)(1). Green Master's Exceptions at 26.

As previously discussed, although a party's intent is irrelevant to the issue of whether its conduct constitutes a violation of 10(b)(1), when assessing civil penalties an ALJ may take such intent into consideration in determining whether its conduct was "knowing and willful." In this regard, the Commission has found that an NVOCC must educate itself through normal business resources, and repeated failure to do so may indicate that it is acting "willfully and knowingly" within the meaning of the statute.²³ The Commission has also stated that conduct is considered "willful" if it is "marked by careless disregard for whether or not one has the right so to act."²⁴ Respondent's repeated failure to file its specific commodity rate on 20 occasions indicates that it was, at the very least, "careless" in fulfilling its Shipping Act obligations and that its failure to file its tariff rates was not a mistake, as it claims. We therefore affirm the ALJ's finding that Green Master acted

²³See In re Rubin, 6 F.M.B. at 239-240 (stating that persistent failure to inform oneself by means of normal business resources might mean that a shipper or forwarder was acting "knowingly and willfully").

²⁴Trans Ocean-Pacific, 27 S.R.R. at **412**, (citing United States v. Murdoch, 290 U.S. 389 (1933)).

knowingly and willfully with regard to the 10(b)(1) violations for the purposes of imposing greater penalties.

2. Factors Considered in Determining the Civil Penalty

Section **13(c)** of the Shipping Act requires that in determining the amount of a civil penalty, an ALJ must:

consider the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

46 U.S.C. app. § **1712(c)**. See also, 46 C.F.R. § 502.603(b).

Green Master only excepted to the ALJ's findings as to its culpability, history of prior offenses and ability to pay.

a. Culpability and History of Prior Offenses

The ALJ found that Green Master's general manager, Mr. Sun, previously worked for TOP, against which the Commission had assessed penalties in the amount of \$1,450,000.²⁵ The ALJ stated that, as a result, Green Master "was personally familiar with the Commission's attitude towards violations of section 10(b)(1)." I.D. at 24. The ALJ further noted that beyond asserting that BOE did not sufficiently establish this allegation, Green Master did not deny that Mr. Sun previously worked for TOP and found, in addition, that one could infer that Green Master's Jeff Sun was the same "Jeff Sun" involved in the control of TOP and that the rest of

²⁵See Trans Ocean-Pacific, supra.

Green Master's management knew or should have known that Mr. Sun had a history of ignoring the Shipping Act. Id. at 25.

Green Master contends that the ALJ's reliance on BOE's allegation that the Mr. Sun who is their general manager was the same Mr. Sun who worked for TOP is "misplaced," stating that BOE's contention is based on an allegation from an unnamed source. Green Master's Exceptions at 27. Green Master further contends that BOE had ample opportunity during discovery to explore and substantiate this allegation and failed to do so, and that BOE has submitted no evidence showing that the Jeff Sun who worked for TOP was personally involved in the Shipping Act violations. Id. In addition, Green Master maintains that, according to BOE's own evidence, the TOP employee responsible for the violations was someone by the name of Eddie Ng and that there is no finding or evidence indicating that the Jeff Sun who worked for TOP was aware of Mr. Ng's activities or condoned them. Id. at 27-28. Finally, Green Master opines that no "Jeff Sun" has ever been found liable for Shipping Act violations. Id. at 29.

BOE contends that the ALJ was correct to factor Mr. Sun's shipping knowledge and experience into Respondent's culpability and to use this information as an aggravating factor in determining the appropriate civil penalty to impose. BOE's Reply at 20.

BOE submitted an affidavit by Martin W. Wilson, a transportation specialist in the Commission's Bureau of Consumer Complaints and Licencing, who testified that a comparison of the signatures of Green Master's general manager, Jeff Sun, and the former president of TOP indicates that the signatures belong to the same person, and Green Master has not rebutted this evidence. Thus, the ALJ's conclusion -- that Green Master's general manager, Jeff Sun, had prior Shipping Act experience and, in fact, was the president of an NVOCC upon which the Commission imposed

significant penalties -- is sound. Even if, as Green Master argues, its general manager was not “personally involved” in the Shipping Act violations at his former company, the fact remains that he managed a company previously found to have violated the Shipping Act.

Because of its general manager’s prior history as the president of a company the Commission had penalized for violations, the ALJ’s conclusion that Green Master may be expected to have known of its obligations to file its commodity tariff rates and the penalties associated with failure to do so is supportable. We therefore affirm the ALJ’s finding that this fact constitutes an aggravating factor for the purposes of determining civil penalties.

b. Respondent’s Ability to Pay

The evidence pertaining to Green Master’s ability to pay includes its balance sheets and Income Tax Settlement and Return Sheets for fiscal years **1998-2000**, as well as an affidavit by BOE’s witness, James F. Carey, analyzing Green Master’s financial records. The ALJ found that Green Master had “a net operating income in the \$6,000,000-\$7,000,000 range” in the years 1998-2000 and that this period of time coincided with “a period of weakened economic conditions in the shipping industry.” I.D. at 13. The ALJ also found that Green Master’s total assets exceeded its total liability and that it has a fully paid capital of \$239,902. Id. In addition, the ALJ found that Green Master employs approximately 50 people; owns and controls three other companies sharing Green Master’s office in Taiwan, each having a minimum of 45 employees; and is a medium to large size ocean transportation intermediary in healthy financial condition. Id. at 13-14.

Green Master objects to the ALJ’s reliance on Mr. Carey’s testimony, arguing that, although the ALJ termed Mr. Carey an

“expert,” he was never qualified as an expert of any sort in this case. Green Master’s Exceptions at 29. Green Master states that Mr. Carey has merely been an investigator for the Commission since 1976, and that while he may have an undergraduate degree in accounting and finance, and experience in preparing and evaluating corporate financial records and tax returns, these factors do not qualify him as an expert in accounting and finance and the analysis of financial statements. Id. As for Mr. Carey’s affidavit, Green Master alleges that his statement that Green Master maintained a net operating income in the \$6,000,000 - \$7,000,000 US dollar range from 1998-2000, “is highly misleading.” Green Master’s Exceptions at 29. Citing Cari-Cargo Int’l. Inc. Jorge Villena And Sea Trade Shipping, 23 S.R.R. 1007, 1020, (I.D.), administratively final April 24, 1986, Green Master asserts that the Commission has always stated that its intention in assessing civil penalties is not to put companies out of business. Id. at 3 1.

BOE, however, avers that Green Master’s argument is misplaced because Mr. Carey is a Commission area representative and that he has an educational background in accounting. BOE’s Reply at 20. Further, BOE asserts that Mr. Carey is experienced in preparing and evaluating financial records and tax returns and that, as a result, he is qualified to testify in proceedings with respect to financial records and tax returns. Id. at 20-21. Also, BOE points out that the Commission has relied on Mr. Carey’s testimony in other Commission proceedings. Id. at 21. In addition, BOE asserts that Mr. Carey based his conclusion that Green Master’s assets surpassed its liabilities and that its net worth remained positive, showing a strong increase from 1999-2000, on Green Master’s own financial documents. Id. at 22. In addition, BOE maintains that Mr. Carey’s testimony that Green Master is a medium to large size ocean transportation intermediary in strong financial condition is based not only on his review of Green Master’s financial records

but also on his knowledge and experience in the shipping industry. *Id.*

BOE points out that it entered into a stipulation with Green Master concerning Green Master's financial documents, allowing the parties to cite and discuss the content of the financial records without having to submit the actual documents into the record. *Id.* BOE urges the Commission to uphold the ALJ's assessment of civil penalties, stating that the ALJ's analysis utilized all the evidence presented by the parties in their direct cases and conformed to the statutory requirements as well as Commission precedent for setting a civil penalty. *Id.* at 25.

The Commission has relied on Mr. Carey's testimony in other proceedings, and he has demonstrated that he has the necessary experience to testify in Commission proceedings, as well as knowledge of the issues about which he testifies.²⁶ In this case, Mr. Carey evaluated documents provided by Green Master and gave an informed opinion based on information contained in the documents. Green Master has not made a credible showing that these documents were inaccurate or that Mr. Carey's analyses of the information therein were wrong. It does not appear, therefore, that the ALJ erred by either relying on Mr. Carey's analyses or the documents themselves in determining that Green Master has the ability to pay the assessed penalty.

Finally, the ALJ properly considered and weighed all of the evidence in the record in formulating the amount of the penalty to impose, as required by section 13(a). He imposed \$22,500 for each

²⁶See Ever Freight Int'l Ltd. 28 S.R.R. 329, 336 (I.D.), administratively final June 26, 1998, where the Commission stated that a regulatory agency such as the Commission is presumed to be familiar with the industry it regulates.

of the 68 violations, rather than the statutorily allowed maximum of \$27,500 per violation, using as guidance Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665 (I.D.), administratively final October 18, 2001, where the Commission chose to assess less than the maximum penalty, finding that assessing a lesser amount was sufficiently punitive.

Although civil penalties up to \$27,500 could be imposed for each of the violations, it appears that the ALJ properly weighed all of the requisite factors in formulating his penalty and that the penalty assessed is adequate to serve as a deterrent, but not excessive. In addition, it appears that Green Master is in a healthy financial condition and is able to pay the assessed penalty. Therefore, we affirm the ALJ's determination to impose civil penalties in the amount of \$1,530,000.

E. Green Master's Motion to Reopen the Proceeding for the Submission of New Evidence With Regard to the Section 10(a)(1) Violations

On December 9, 2002, almost three months after the filing of its exceptions and BOE's reply to exceptions, Green Master filed a Motion to Reopen the Proceeding for the Submission of New Evidence, pursuant to Rule 230 of the Commission's Rules of Practice and Procedure. Green Master asserts that its Motion meets the requirements of the rule, contending that material changes of fact and/or law have occurred since the conclusion of the hearing. Green Master's Motion to Reopen at 1.

Green Master seeks to introduce into evidence a second affidavit from Mr. Ng, with two exhibits attached, which collectively are purported to show that Green Master was authorized to act as Hudson's agent. Mr. Ng's second affidavit

reiterates the content of his first affidavit and attaches an unsigned e-mail purportedly from a “Mr. Wong, Deputy General Manager-Transpacific Export Sales,” stating, in pertinent part, that “we had duly acknowledged your notification in previous years in informing us ‘Green Master’ is acting as your Taiwan agent in handling transpacific traffic ever since in 1998.” Also attached is a list dated April 15, 1998, entitled “Hudson Shipping (Hong Kong) Ltd. F-E Asia Agent,” containing the names and addresses of certain entities, including Green Master, whose name and address appears next to a portion marked “Taiwan Taipei.” See Second Verified Statement and exhibits marked “Exhibit A” and “Exhibit B.” Mr. Ng contends that Exhibit A is a written e-mail acknowledging that Hyundai had received Hudson’s “service contract notifications” since 1998 informing it that Green Master was Hudson’s Taiwan agent for transpacific traffic. Second Verified Statement at 1. Mr. Ng also avers that Exhibit B was used to notify the carriers with which Hudson had service contracts that Green Master was authorized to act as its booking agent under those contracts. Id.

Green Master asserts that this evidence, which it claims only became available after issuance of the ALJ’s decision in this proceeding, is material, would substantially eliminate the basis for the ALJ’s factual conclusions and also corroborates the affidavits it submitted. Id. at 3-6. In addition, Green Master avers that it has been diligent in discovering this evidence. Id. at 7.

BOE opposes Green Master’s Motion, arguing that Green Master’s attempt to paint its proffered evidence as new and previously unavailable is without merit. BOE’s Reply to Motion to Reopen at 2. BOE further argues that if the information contained in Hyundai’s e-mail is to be believed, Hyundai, Mr. Ng and Respondent knew that Respondent was Hudson’s agent at the time of the service contract with Hyundai. BOE opines that the fact that the proffered e-mail was created after the ALJ issued his

I.D. does not make that information new or previously unavailable, arguing that the information in that e-mail was well known to Respondent's witnesses and was presented in their testimony. Id. at 3. BOE further notes that the agent list is dated April **15, 1998**, and that Respondent could have obtained the document from Hudson at any time prior to December 9, 2002 (the date Green Master filed its Motion). Moreover, BOE submits that not admitting the document into the record in this proceeding does not harm Respondent's position because Respondent's witnesses have already testified that Green Master was Hudson's agent. Id. at 4. BOE also opines that neither the e-mail nor the agency list shed any new light on the facts in this proceeding. Id. BOE requests, therefore, that the Commission deny Green Master's Motion to Reopen the Proceeding for the Submission of New Evidence. Id.

Rule 230(a) provides that a motion to reopen shall set forth the grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. 46 C.F.R. § 502.230(a). Rule 230(d) provides that before issuance of a Commission decision, the Commission may, after petition and reply or upon its own motion, reopen a proceeding for the purpose of taking further evidence. **46** C.F.R. § 502.230(d). A material fact is defined as "one that might affect the outcome of the suit under the governing law."²⁷

Green Master contends that the newly offered evidence provides independent corroboration that it was acting as Hudson's agent in booking the subject shipments. It appears that the e-mail from Hyundai was obtained after the issuance of the I.D. on July 30, 2002, having purportedly been created on August 7, 2002. However, it does not appear to lend any additional support to Green Master's contention that it acted as Hudson's agent. Apart

²⁷Gonzalez v. Torres, 915 F.Supp. 511,515 (D.P.R. 1996).

from the fact that it is an unsigned statement, it does not in any way corroborate that Green Master was acting as Hudson's agent for the disputed shipments. Rather, it appears to confirm that Hyundai was led to believe that Green Master was Hudson's agent, a fact previously alleged by BOE. Moreover, the "service contract notifications" referred to by Mr. Ng as having been provided by Hudson to Hyundai have never been submitted in this case.

In addition, the agent list described as Exhibit B does not prove that Green Master was acting as Hudson's agent for the purposes of booking the stated shipments. There is no evidence showing, as asserted by Mr. Ng, that the list was provided to carriers to notify them that Green Master was authorized to book shipments under Hudson's service contracts. Moreover, the evidence indicates that Hudson's "agents" were required to pay a fee to utilize Hudson's service contracts; thus, it appears that these agents were not acting on behalf of Hudson, but rather for themselves.

The evidence Green Master seeks to introduce does not justify a reversal of the ALJ's finding that Green Master violated section 10(a)(1). ~~The~~ ~~re~~ ~~the~~ evidence merely reiterates Green Master's prior assertions in the course of this proceeding and does not describe a material change of fact or law alleged to have occurred since issuance of the I.D. Therefore, we will deny Green Master's Motion as it appears to be simply another attempt to convince the Commission that Green Master was authorized to act as Hudson's agent on the shipments, a position the ALJ has already rejected based on substantial evidence.

THEREFORE, IT IS ORDERED, That the Initial Decision is affirmed, to the extent discussed above;


IT IS FURTHER ORDERED, That BOE's Motion to Strike the cited portions of Green Master's Memorandum of Exceptions and Brief in Support of Memorandum is granted;

IT IS FURTHER ORDERED, That Green Master's Motion to Reopen the Proceeding for the Submission of New Evidence is denied;

IT IS FURTHER ORDERED, That the ALJ's assessment of a \$1,530,000 civil penalty against Green Master is affirmed; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.



Bryant L. VanBrakle
Secretary